No. 87-1249

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

PLITT THEATRES, INC., a corporation,
Petitioner,

vs.

SAM T. COSTON,
Respondent.

RESPONDENT COSTON'S BRIEF IN OPPOSITION TO PLITT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Sam T. Coston Responds in Opposition to the Petition of Plitt Theatres, Inc. for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

c.

STATEMENT OF THE CASE (GENERALLY)

This is an age discrimination jury case brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 *et. seq.* Plaintiff Sam T. Coston was employed by the Defendant Plitt Theatres, Inc. until January 4, 1982. Plitt fired Coston a few days prior to his 59th birthday.

At the close of trial on March 29, 1984, the jury entered a verdict in favor of Coston and made a specific finding that Plitt's violation of the ADEA was willful. On October 3, 1984 the district court awarded Coston double damages based upon Plitt's willful violation. (Pet. App. D at 44a). On June 3, 1986, the district court denied Plitt's post-trial motions which had challenged both the verdict and the award of liquidated damages for a willful violation. (Pet. App. E at 53a-55a).

Plitt then appealed the district court's entry of judgment on the verdict and on willfulness. The Court of Appeals affirmed the district court on those issues. (831 F.2d 1321 at 1325-1328 (7th Cir. 1987); Pet. App. A at 4a-10a).

d.

STATEMENT OF THE CASE (FACTS)

Plitt had seven district managers in the Chicago area. In January 1982, it fired Coston, yet retained younger district managers Pat Burns and Kurt Noack. (831 F.2d at 1324; Pet. App. A at 3a). Coston was then almost age 59, Noack 32, and Burns 26. (Resp. App. A at 1a).

i. Direct evidence of willful discrimination

The Plitt decision to fire Coston was made by executive vice president Harold Klein and carried out by vice president Irwin Cohen. (831 F.2d at 1324; Pet. App. A at 3a). Coston testified at trial that in response to Coston's

inquiry at the firing, Cohen offered the following rationales for firing Coston rather than Burns or Noack: (a) Burns had seniority; (b) Noack was "super"; (c) "we have to go along with youth." (831 F.2d at 1324; Pet. App. A at 3a).

Plitt did not object to Coston's trial testimony about Cohen's admission that Plitt was going with youth. (Tr. 152-5; Resp. App. B at 2b-5b). Nor did Plitt object to the district court's later instruction to the jury that the agency status of Cohen rendered his acts the acts of Plitt (Tr. 336-7, 398; Resp. App. B at 12b-13b, 15b).

ii. Evidence of pretext

Although Burns had been with Plitt since 1970 (starting as an usher, Tr. 89; Resp. App. B at 1b), he had served less time than Coston as a district manager. (831 F.2d at 1326; Pet. App. A at 6a). Coston had also been a district manager since prior to Noack having any position at Plitt. (Tr. 154; Resp. App. B at 4b).

Noack had preceded Coston as district manager of the Water Tower district. (831 F.2d at 1325-6; Pet. App. A at 6a). "[T]here was testimony from several witnesses at trial, including Klein, that the Watertower theater was in poor shape during Noack's tenure there as district manager, a condition that did not recur when Coston took over as district manager there." (831 F.2d at 1326; Pet. App. A at 6a-7a). "It is also undisputed that Coston improved the situation at Water Tower from what it had been during Noack's tenure . . . " (831 F.2d at 1325-6; Pet. App. A at 6a).

iii. The willfulness instruction

At the jury instruction conference, the attorneys and the court discussed an instruction on willfulness. Plitt objected to the giving of any willfulness instruction, as it claimed that Coston had submitted no evidence in support of a willful violation. Plitt did not claim that the proposed willfulness instruction (*i.e.* Coston's proposed instruction

#12, which was ultimately given) misstated the law. Nor did Plitt offer its own proposed instruction with a different definition for willfulness. (Tr. 293-4; Resp. App. B at 10b-11b).

When the district court later instructed the jury on willfulness, it also advised the jurors of Plitt's stipulation that Plitt "was at all times aware of the illegality of age discrimination." (831 F.2d at 1327; Pet. App. A at 8a).

iv. District court review on pretext and willfulness

In reviewing the jury's verdict that Plitt had violated the ADEA, the district court found that the jury had sufficient evidence to find for Coston on the basis of "direct and circumstantial evidence . . . " (Pet. App. E at 53a). The district court noted the evidence that Plitt had discharged Coston in favor of "a younger less-able employee." (Pet. App. E at 54a).

In denying Plitt's attempt to overturn the willfulness portion, the district court did not mention the *Sywock* standard from which the jury instruction had been taken. Rather, the court cited *Thurston*. (Pet. App. E at 55a).

v. Appellate review on pretext and willfulness

In reviewing Plitt's claim that Coston had been fired because of incompetence, the Court of Appeals found "significant, if not overwhelming, evidence that Coston's work was competent and that he was qualified to remain as a district manager." (831 F.2d at 1326; Pet. App. A at 6a). In evaluating the direct evidence of discrimination presented to the jury, the Court of Appeals described Cohen's direct discriminatory remark as "the clinching evidence." (831 F.2d at 1326; Pet. App. A at 7a). The Court of Appeals also found sufficient evidence that any Cohen legitimate explanation was pretextual. (831 F.2d at 1326, Pet. App. A at 7a).

As the Court of Appeals found that there was no error in the jury instruction on willfulness, it did not reach the issue of whether Plitt's failure to object to the instruction's willfulness definition constituted a waiver. (831 F.2d at 1327; Pet. App. A at 9a).

e.

SUMMARY OF ARGUMENT

As to the willfulness instruction:

1. At the jury instruction conference, Plitt limited its objection on willfulness to its (erroneous) claim that no evidence of willfulness had been presented. Plitt did not object to *Sywock's* definition of willfulness. Nor did Plitt submit its own instruction with a different definition. Plitt therefore waived the issue.

2. When this Court decided *Thurston* in January 1985, post-trial motions were still pending in the instant case. Plitt advised the district court of this Court's decision in *Thurston*. Nevertheless, the district court in June 1986 found that any post-trial objection to the jury instruction had been abandoned by Plitt's failure to sufficiently argue those points in its post-trial submissions. Regardless of whether the district court was correct in its finding of abandonment, that finding was itself waived by Plitt's failure to seek review of that finding in the Court of Appeals.

3. Even if Plitt's failure to object were not a complete waiver, Plitt's failure to seek timely relief at the jury instruction conference means that *Thurston* should not be applied retrospectively in the instant case – a dispute between private parties. This Court has traditionally refused to apply decisions such as *Thurston* retrospectively, where to do so would otherwise affect the rights of private parties, unless the complaining party seeks timely relief initially from the district court.

4. If the *Sywock* instruction was indeed error, any error was harmless under the facts here. Plitt admitted that

it was aware of the illegality of age discrimination (as opposed to merely admitting that the ADEA applied or was 'in the picture'). The evidence of Cohen's discriminatory admission shows that Plitt knew age to be a determining factor in Coston's discharge. As Plitt thus knew its acts to be illegal, the evidence here satisfies either a *Thurston* or *Syvock* standard.

5. When the district judge reviewed Plitt's post-trial motion on willfulness, he applied a *Thurston* standard and found that the jury verdict was supported by ample evidence. This finding cannot be reversed absent an abuse of discretion. To review that finding would require this Court to re-weigh evidence already evaluated by the jury and judge who observed the trial.

6. Cases applying *Syvock* in the Seventh Circuit show that its use has not diluted the two-tier examination prescribed by *Thurston*. Rather, those cases show that under *Syvock*, liquidated damages are not awarded automatically. As nothing in *Thurston* precludes the willfulness definition set forth in *Syvock*, there was no error here.

As to whether a reduction in force can be considered pretextual in an ADEA case:

7. The employment decision here was not Plitt's decision to conduct a reduction in force, but rather its selection of Coston (as opposed to a younger district manager) to be the victim of that reduction in force. Plitt has thus mischaracterized the issue, as neither the jury nor the court adjudicated whether the reduction in force itself was pretextual.

8. Although Coston admitted that a reduction in force was warranted, his admission did not go to the issue of whether such a retrenchment was warranted among the district managers. Instead, Coston put in evidence that shortly after his firing, Plitt created the position of district manager in training, and that Plitt filled that position with a younger, less capable employee. The jury thus had ample

evidence to conclude that applying the reduction in force to the district manager category was a pretext to get rid of an older district manager.

f.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE WILLFULNESS INSTRUCTION

A.

A Grant Of Certiorari Would Not Change The Outcome, As Plitt Waived Its Challenge To The Willfulness Instruction By Failing To Offer A Specific Objection To That Instruction.

Nothing short of misleading is Plitt's averment (Pet. at 8) that it objected to the trial judge that a *Syvock* instruction equated willfulness with mere negligence and that Plitt's mere knowledge of the ADEA would not amount to a willful discharge. Plitt's petition does not cite to the trial transcript, because Plitt made no such objection.

Rather, as shown by the trial transcript, Plitt's only objection was limited to Plitt's (erroneous) assertion that Coston had submitted no evidence in support of a willful violation. (Tr. 293-4; Resp. App. B at 10b-11b).

[Under Supreme Court Rule 21.5, Plitt's presentation in its Petition of such a material inaccuracy is sufficient reason in and of itself to deny certiorari here.]

Plitt's failure to timely and specifically object to the jury instruction as being a correct definition of willfulness waives any error. See FRCP 51; *Palmer v. Hoffman*, 318 U.S. 109 at 119-20 (1943). A party's blanket objection to the giving of any instruction on a certain issue is insufficient to preserve an objection to the language of the instruction given. *Williamson v. Handy Button Machine*

Company, 817 F.2d 1290 at 1295-6 (7th Cir. 1987). Nor does the doctrine of "plain error" protect parties from failure to object in civil cases. *Id.* at 1295.

Despite the law on waiver set forth above, the Court of Appeals here did not reach the issue of whether Plitt waived its right to appeal the *Syvock* instruction. (831 F.2d at 1327; Pet. App. A at 9a). Plitt may offer the fact that the court in *Rengers v. WCLR Radio Station*, 825 F.2d 160 (7th Cir. 1987) found no waiver in a similar situation. Among other things, the *Rengers* court based its finding on the fact that *Syvock* was the law of the circuit at the time of the trial; *Thurston* had not yet been decided; and the "increased frequency with which parties have been sanctioned for challenging legal standards that are well established in a Circuit . . . " *Id.* at 165.

But one must question the reasoning of *Rengers* on the waiver issue. Coston is aware of no instance of any trial court anywhere penalizing a party for informing the court that he is offering an objection to an established view for the purpose of preserving his right to later seek review from higher authority under FRCP 51. Moreover, under the facts here, Plitt had the opportunity to timely and specifically seek a *Thurston*-type instruction if it so desired:

1. The Second Circuit in *Thurston* had approved the reckless disregard willfulness standard seven months prior to the March 1984 Coston-Plitt trial. See *Air Line Pilots Association International [Thurston] v. Trans World Airlines*, 713 F.2d 940 at 956 (2nd Cir. 1983);

2. This Court granted certiorari in *Thurston* prior to the trial here. See *Trans World Airlines v. Thurston*, 465 U.S. 1065 (1984).

Further, as Plitt notes (Pet. at 3), *Thurston* was decided while this case was still at the post-trial motion stage. The district judge therefore had the discretion to deny any Plitt post-trial attack on the willfulness instruction, in light of the fact that Plitt had pre-trial constructive

notice that the willfulness definition issue was pending before the Supreme Court. Where a party forgos at trial a legal argument which is pending before the Supreme Court in a similar case, and it later attempts after trial to reinstate that argument following a favorable Supreme Court ruling, the district court may deny that attempt at reinstatement. See *DelRio Distributing v. Adolph Coors Co.*, 589 F.2d 176 at 178-9 (5th Cir. 1979), cert. den'd 444 U.S. 840 (1979).

If this Court were to grant certiorari on the willfulness instruction, a likelihood exists that this Court would either find that Plitt waived its objection under FRCP 51 or that a remand is necessary to the Court of Appeals on the issue of waiver. Therefore this case is not a good candidate for certiorari.

B.

Second Waiver On Jury Instruction: The District Judge Found In A Post-*Thurston* Order That Plitt Had Abandoned The Issue Of The Jury Instructions By Failing To Sufficiently Argue Those Instructions In Its Post-Trial Submissions. Even If The District Judge's Finding Of Abandonment Was Erroneous, Plitt Waived Any Attack On That Finding By Ignoring The Finding In Plitt's Brief To The Seventh Circuit.

This Court decided *Thurston* in January 1985. Plitt correctly notes that the instant case was still on post-trial motions rather than on appeal. (Pet. at 3).

Plitt's post-trial motion was not denied until June 1986 – almost one and a half years after *Thurston*. (See Pet. App. E, at 50a-57a). Indeed (as noted in Plitt's brief to the Seventh Circuit) while the post-trial motions were pending, Plitt cited the new *Thurston* decision to the district court. (Plitt 7th Cir. brief at 19; Resp. App. C at 2c-3c).

Plitt's *Thurston*-based appeal to the Seventh Circuit was in part premised upon the district court's refusal

"to set aside the jury's verdict after being advised of the Supreme Court's most recent pronouncement on the issue." (Plitt 7th Cir. brief at 19; Resp. App. C at 2c). However, on the issue of the jury instructions, the district judge had ruled as follows:

> "Because the defendants brief in support of its motion for a judgment notwithstanding the jury verdict did not argue the issues of the jury instructions or the special interrogatory, the court will not consider those issues." (Pet. App. E at 54a, n.1).

The district judge thus found that despite the fact that *Thurston* had been decided 1-1/2 years earlier, Plitt still had not sufficiently argued the jury instruction issue in post-trial submissions, and that Plitt had therefore abandoned that issue.

Had Plitt offered a specific objection at the jury instruction conference, then it would not have been required to repeat that objection in its post-trial motion. 6A *Moore's Federal Practice*, ¶59.14 at 59-304, 59-305 (1982). Plitt's position is that it did not become aware of any *Thurston*-based objection until the case was on post-trial motions. But if a party becomes aware of an objection only after the verdict and before resolution of post-trial motions, then it waives the objection unless it sufficiently argues the point in post-trial motions. See generally, 6A *Moore's Federal Practice* ¶59.14 at 59-306 (1982) (regarding requirement of post-trial motion on certain limited issues which call for district court to exercise discretion). The district judge would be the best one to evaluate whether a *Thurston* instruction would have changed the outcome, as "the trial court occupies the best vantage from which to estimate the prejudicial impact of the error on the jury." *Cruthirds v. RCI, Inc.*, 624 F.2d 632 at 635 (5th Cir. 1980).

Even if one assumes that the district court abused its discretion in finding that Plitt abandoned the jury

instruction issue through insufficient post-trial submissions, Plitt never attacked that finding on appeal. When Plitt's brief presented its issues for review to the Court of Appeals, Plitt did not mention any issue of 'abandonment by insufficient post-trial submissions.' (See Plitt 7th Cir. brief at 1; Resp. App. C at 1c). In the argument section of Plitt's brief, Plitt omitted any mention of the district judge's finding that Plitt's posttrial submissions had insufficiently addressed the issue of jury instructions. (See Plitt 7th Cir. brief at 19-22; Resp. App. C at 2c-6c).

Plitt's failure to present and argue to the Court of Appeals the district judge's finding of abandonment is itself waiver of any such error, and thus a ratification of the district judge's finding. See *Morrison v. City of Baton Rouge*, 761 F.2d 242 at 244 (5th Cir. 1985). "[E]ven an issue expressly presented for resolution is waived if not developed by argument." *Bonds v. Coca Cola Co.*, 806 F.2d 1324 at 1328 (7th Cir. 1986). Plitt cannot now seek Supreme Court review of the district court's post-trial refusal to overturn the jury instruction, after Plitt failed to seek Seventh Circuit review of the district court's explanation for that refusal.

Regardless of whether Plitt's silence at the jury instruction conference constitutes a waiver, the district judge found that Plitt insufficiently argued *Thurston* in the one and one half years after *Thurston* and prior to the district judge ruling on Plitt's post-trial motion. But even if the district judge erred, Plitt committed a second waiver by failing to seek review of the district court's finding.

A grant of certiorari here would therefore place this Court into a quagmire of factual issues about waiver (twice). There is only a slim chance that this Court could avoid a finding of waiver, avoid a remand to the Court of Appeals on the factual issue of waiver, and eventually get to a legal issue. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*,

268 U.S. 220 at 227 (1925). Certiorari should therefore be denied.

C.

Even If Plitt's Waiver Is Excused, This Is The Type Of Case Where It Would Be Unjust To Apply *Thurston* Retrospectively

Even if there is no waiver here, Plitt's failure to timely object still operates to prevent a retrospective application of *Thurston* to the case at bar. This is a case between two private parties. There is no public institution or governmental body involved. As the retrospective operation of a law may result in manifest injustice to parties "in mere private cases between individuals," courts should "struggle hard" against a retrospective construction which would otherwise affect the rights of those parties. *Bradley v. Richmond School Board*, 416 U.S. 696 at 716-7 (1974).

Certiorari should therefore be denied, as Plitt has failed to make a showing that review by this Court would change the outcome of a private case tried prior to *Thurston*.

D.

Certiorari Should Not Be Granted, As Any Error Was Harmless

Plitt stipulated that it was at all times aware of the illegality of age discrimination (as opposed to merely knowing that the ADEA was in the picture, or that the ADEA applied). (831 F.2d at 1327; Pet. App. A at 8a). If the jurors were convinced from the evidence that Plitt knew that age was a determining factor, then the jurors could automatically (based on the stipulation) conclude that Plitt also knew that it was acting illegally.

Coston's testimony as to Cohen's discriminatory admission ("the clinching evidence", 831 F.2d at 1326; Pet. App. A at 7a) shows that Plitt knew age to be a determining factor.

Nor can Plitt claim that the jury should have ignored Coston's testimony about Cohen's admission. By failing to object to the jury instruction (on agency) that Cohen's comment was the comment of Plitt (Tr. 336-7, 398; Resp. App. B at 12b-13b, 15b), and by failing to object to Coston's testimony (Tr. 152-5; Resp. App. B at 2b-5b), Plitt waived any arguments that the jury should not have bound Plitt to Cohen's comment. See Fed. R. Evid. 103(a)(1); FRCP 51; *Palmer v. Hoffman*, 318 U.S. 109 at 119-20 (1943).

Further, rather than emphasizing a (*Syvock* or *Thurston*) two-tier examination, Plitt invited an "all or nothing" result with the following comments in its closing argument to the jury:

> "... First of all, Mr. Cohen flatly denies that he said any such thing. What you have then is the word of one man against another word of another man. And as the Court is going to instruct you in deciding this case, you are going to have to decide it by what is called a preponderence of the evidence. It has to weigh down on the scales in favor of one or the other." (Tr. 382; Resp. App. B at 14b).

Since the jurors concluded that Plitt knew it was acting illegally, it is immaterial whether they even considered that Plitt should have known (*Syvock*) or acted in reckless disregard (*Thurston*). As Coston satisfied an actual knowledge standard which is stricter than *Thurston*, he satisfied both the *Thurston* and *Syvock* standards as well.

The factors unique to this case (Cohen comment, Plitt stipulation, Plitt closing argument) show why even if this Court were to grant certiorari in *WCLR Radio Station v. Rengers*, petition pending in #87-761, certiorari should not be granted here. As there is no evidence that the employer in *Rengers* admitted that it was going with youth (see 825 F.2d 160 (7th Cir. 1987)), the two cases are different in terms of degree of harmless error. (Nor is the employer in *Rengers* saddled with the problem of an unreviewed district

court finding that the jury instruction issue was abandoned by insufficient post-trial submissions.)

Moreover, the jury here found Plitt's explanations to be pretextual (and thus untrue) (831 F.2d at 1326; Pet. App. A at 6a-7a). If Plitt were not aware of its illegal acts, then it would not have contrived pretextual explanations for those acts. Where (a) the employer admits knowledge that the ADEA prohibits using age as a factor in making employment decisions; and (b) the jurors find that the employer intentionally discriminated and that its proffered explanation is pretextual; then the employee is entitled to a willfulness award under the *Thurston* standard. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094 at 1099-1101 (11th Cir. 1987).

Cohen's comment shows intentional discrimination. Plitt's offering of a pretextual defense also shows intentional discrimination. When either proof of intentional discrimination is coupled with Plitt's stipulation, the result is a jury finding of Plitt's actual knowledge sufficient to satisfy not only *Syvock* and *Thurston*, but even a stricter standard.

Indeed, when the district judge denied Plitt's post-trial motion on willfulness, he did not mention *Syvock*. Rather, the judge referred to a *Thurston* standard. (Pet. App. E at 55a). The judge who listened to the witnesses thus already provided Plitt what it now seeks – a review under the *Thurston* standard.

Certiorari should not be granted, as any error here was harmless and would not change the outcome. See 28 U.S.C. §2111. The district judge, having superior vantage, reviewed the evidence under a *Thurston* standard. His finding of sufficient evidence to support a *Thurston* willfulness award cannot be overturned absent an abuse of discretion. See *Cruthirds v. RCI, Inc.*, 624 F.2d 632 at 635 (5th Cir. 1980). This Court should not grant certiorari merely to reweigh the same evidence that the district judge reviewed.

E.

Use Of The *Syvock* Standard Is Not Erroneous, As It Preserves The Two-Tier Examination In Both Theory And Practice

There is nothing in *Thurston* which precludes the use of a *Syvock* instruction. In *Thurston*, the Supreme Court disapproved the specific intent willfulness standard utilized in the First Circuit (469 U.S. 111 at 126, n.19), and also disapproved the lesser standard that an act is willful if the employer merely knew of the potential applicability of the ADEA. *Id.* at 127-8. *Thurston* did not comment on the *Syvock* standard or any identical standard.

In approving the Second Circuit's "knew or showed reckless disregard" standard of willfulness, *Thurston* described that standard as "reasonable" and "an acceptable way" of defining willfulness. *Id.* at 126, 128-9. By classifying the Second Circuit standard as *an* acceptable way (rather than *the* acceptable way), *Thurston* thus contemplates that other standards may also be acceptable. See *Golomb v. Prudential Insurance*, 688 F.2d 547 at 552, n.2 (7th Cir. 1982), insofar as differentiating "an" from "the".

Syvock is consistent with *Thurston's* emphasis on preserving a two-tier examination. *Syvock* emphasizes that an award of liquidated damages is not and should not be automatic. *Syvock*, 665 F.2d 149 at 154-156 (7th Cir. 1981).

More importantly, the Seventh Circuit does not merely give lip-service to the two-tier examination. Rather, it applies that examination in practice. In *Syvock* itself, the court refused to award liquidated damages to the prevailing plaintiff. *Id.* at 158. More recently, in *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 at 117 (7th Cir. 1986), cert. den'd 107 S.C. 1983 (1987), the Seventh Circuit again refused to award liquidated damages to a prevailing plaintiff.

If the two-tier examination in the case at bar appears to Plitt to have been watered down, that appearance results

only from the fact that the evidence here (the combination of Cohen's discriminatory admission, Plitt's stipulation, and Plitt's solicitation of an 'all or nothing' verdict) made the second tier of the examination almost obvious. But not every prevailing plaintiff in the Seventh Circuit will have the evidentiary ammunition carried by Coston here.

Nor is Plitt's reference to alleged juror confusion here (Pet. at 8) worth considering. There is nothing in the record to suggest that Plitt objected to the way the district judge handled the jurors' inquiry. Plitt also omits the fact that the jury withdrew the inquiry (See Plitt 7th Cir. brief at 21, n.*; Resp. App. C at 4c, n.*). Moreover, Plitt did not even raise the juror confusion issue in its post-trial motions. Plitt has therefore waived the issue, as juror confusion is a matter within the district court's discretion. See *DoCarmo v. F. V. Pilgrim*, 612 F.2d 11 at 14-15 (1st Cir. 1979), cert. den'd 446 U.S. 956 (1980). In any event, what a jury *might* be considering when it poses a question is beyond the scope of judicial inquiry. *Id.* at 15; Fed. R. Evid. 606(b).

There thus was no error in the use of a *Syvock* instruction in this case. Certiorari would not change the outcome and therefore should not be granted.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO REVIEW THE JURY VERDICT CONCERNING PLITT'S SELECTION OF COSTON, RATHER THAN A YOUNGER DISTRICT MANAGER, TO BE A VICTIM IN THE REDUCTION IN FORCE. THE JURY HAD AMPLE EVIDENCE THAT AGE WAS A DETERMINING FACTOR IN PLITT'S SELECTION OF COSTON.

A.

The Employment Decision Reviewed By The Jury Was Not The Decision To Conduct A Reduction In Force.

Plitt's petition (at 19) erroneously describes the issue here as whether Plitt intended to discriminate in making the decision to conduct a reduction in force. But the issue before the jury was not the wisdom of Plitt choosing to conduct a reduction in force. Rather, the issue (as correctly framed by the Court of Appeals, 831 F.2d at 1325; Pet. App. A at 5a) was whether Plitt allowed age to be a determining factor in selecting Coston, rather than a younger district manager, to be a victim of that reduction in force. In a reduction in force situation, the employer violates the ADEA if it permits age to be a determining factor in deciding who stays and who goes. *Stumph v. Thomas and Skinner, Inc.*, 770 F.2d 93 at 96 (7th Cir. 1985).

The question presented by Plitt to this Court concerning the reduction in force is thus immaterial to the questions decided by the jury, the district court and Court of Appeals below. In deciding whether or not the jury had sufficient evidence that age was a determining factor in Plitt's choice of which district managers would be fired in a reduction in force, there is no burning question of federal law. Although the case is important to Plitt and to Coston, the jury's weighing of evidence here creates no "special and important reasons" for this Court to grant certiorari.

Certiorari is not warranted to merely review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 at 178 (1938), aff'd 305 U.S. 124 (1938).

B.

Plitt's Petition Ignores That Evidence Was Presented Showing That The Plitt Decision To Cut The Number Of District Managers Was Itself A Pretext

Plitt's petition (at 19) correctly notes that Coston admitted that economic conditions warranted a Plitt reduction in personnel generally. However, there is no Coston admission that it was necessary for Plitt to cut the number of district managers.

Rather, there was evidence presented that even the decision to cut district managers was a pretext for discrimination. In Summer 1982, about seven or eight months after Coston was fired, Plitt created the position of district manager in training (Tr. 234; Resp. App. B at 7b). As trainee, Plitt selected an individual who was about 40 or 41 years old at the time of the trial (and thus in his late 30's at the time Coston was fired). (Tr. 232; Resp. App. B at 6b). Plitt admitted that as of the time of trial, with the trainee having been in training for 1-1/2 years already, the trainee still was not ready to be a district manager. (Tr. 239-40; Resp. App. B at 8b-9b).

The jury thus had ample evidence upon which to conclude that Plitt acted pretextually in eliminating the district manager position of 59 year old Coston, only to hire a trainee in his late 30's. The evidence of pretext grows stronger when one compares the "significant, if not overwhelming, evidence" of Coston's competence (831 F.2d at 1326; Pet. App. A at 6a) against the trainee's inability to learn the job in the space of a year and a half.

Indeed, in finding that the jury had ample evidence of pretext on Plitt's defense of reduction in force, the district

judge noted: "To the reason of reduction in work force the plaintiff put on evidence that Plitt had replaced the plaintiff with a younger, less-effective employee. Presuming, as the court must, that the jury accepted the plaintiff's evidence the jury had a reasonable basis on which to determine that the defendant's reasons were pretextual." (Pet. App. E at 54a-55a).

Granting certiorari on the reduction in force issue would bog this Court down with specific fact-finding. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220 at 227 (1925).

g.

CONCLUSION

For each issue submitted by Plitt, Coston has shown multiple reasons why certiorari should not be granted here. Any of those reasons is sufficient for this Court to deny certiorari. Coston therefore requests that the Plitt petition for writ of certiorari be denied.

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APPENDICES

INDEX
TO RESPONDENT COSTON'S APPENDIX

APPENDIX A: Plaintiff Coston's Trial Exhibit A (Roster of Plitt District Managers as of January 1, 1982) admitted into evidence at trial and listed as item number 104 on the docketing statement prepared by the Clerk of the United States District Court for the Northern District of Illinois.

APPENDIX B: Excerpts from transcript of trial proceedings had before the Honorable Stanley J. Roszkowski on March 26 through March 28, 1984, which transcript was filed with the district court on November 9, 1984 and listed as item number 72 on the docketing statement prepared by the Clerk of the United States District Court for the Northern District of Illinois.

APPENDIX C: Excerpts from Plitt Brief filed with the United States Court of Appeals for the Seventh Circuit on or about September 22, 1986.

APPENDIX A

PLITT THEATRES, INC. CHICAGO AREA DISTRICT MANAGERS AS OF JANUARY 1, 1982

Name	Age as of 1/1/82	Year Appointed District Manager	Base Salary as of 1/1/82
a) Edward Konradt	64	1975	$26,000
b) Sam Coston	58	1978	28,600
c) Giacomo Cataldo	56	1974	20,280
d) Ralph Sullivan	54	1977	20,000
e) Cosimo Rulli	46	1973	26,000
f) Kurt Noack	32	1979	26,000
g) Pat Burns	26	1981	24,700

Plaintiff's Exhibit A

APPENDIX B

Burns - deposition 89

"Q. Is there anything affecting your health or involving medicine you may be taking that would impair your ability to understand my questions to day?

"A. No.

"Q. If at any time you do not understand a question, please ask me to rephrase it; I will be happy to do so.

Tell us about your education. Did you complete high school?

"A. Yes.

"Q. Did you have any education after high school?

"A. Yes.

"Q. Would you tell us about that, please?

"A. I have got a BA in administration of criminal justice from the University of Illinois.

"Q. Is that the Circle or –

"A. Circle.

"Q. Have you ever had any other post-high school education?

"A. No.

"Q. Have you had any other post-graduate education?

"A. No.

"Q. I apologize for re-asking this, if I asked it before.

When did you start with Plitt?

"A. June the 30th, 1970.

"Q. What was your first position with Plitt?

"A. Usher.

MR. KARASIK: Your Honor, we have gone over this several times now.

THE COURT: Sutained. I think you are going right back over the same territory.

BY MR. MATHLESS:

Q. Did you eventually assume the duties of district manager at the Water Tower after Noack?

A. Yes, I did.

Q. Who appointed you district manager of the Water Tower district?

A. Irwin Cohen.

Q. At the time you were fired in January of 1982, was Kurt Noack fired?

A. No, he was not.

Q. Do you know how old Kurt Noack was at the time you were fired and he was not?

A. Approximately 32.

Q. All right. Mr. Coston, I would like to direct your attention to the day you were fired, January 4, 1982.

From whom did you learn that you were being terminated?

A. From Mr. Cohen.

Q. Where did the conversation take place?

A. In Mr. Cohen's office.

Q. Anybody else present besides you and Mr. Cohen?

A. No, there wasn't.

Q. How long was the discussion?

A. Approximately 20 minutes.

Q. What did Mr. Cohen state to you?

A. He stated to me that business conditions were bad and that the company had to cut expenses.

He said that there would be several positions eliminated within the company and that my position would be terminated, and that Friday, January the 8th, would be my last day.

Q. What was your response?

A. In the beginning I was in kind of a state of shock.

Q. Well, what did you say to Mr. Cohen?

A. I said to him that while I had no argument with the elimination of the operations manager position, why could I not remain as a district manager, which I was, and in place of the two younger district managers, either Pat Burns or Kurt Noack.

Q. What, if anything, did you say about Noack and Burns' seniority?

A. Well, I said that I was senior – I had more seniority than either man and that I should be entitled to it.

Q. What was Cohen's reply to that comment?

A. He said to me Pat Burns had seniority and Kurt Noack was super.

After a few seconds' hesitation, he said to me, "Besides, Sam, we have to go along with youth."

Q. What did you say in response to the comment, "We have to go along with youth"?

A. I said to him, "That is right, Irwin. Kurt is 32 years old, isn't he?"

Q. Did Mr. Cohen reply to your comment about Kurt's being 32 years old?

A. He said, "Yes, he is about that."

Q. Did you discuss any other subjects in your meeting with Mr. Cohen?

A. I asked him if Mr. Harold Klein knew of my firing.

Q. What did Cohen say?

A. Mr. Cohen replied that he did.

I then asked Mr. Cohen if within the entire company of Plitt was there not a position for me.

He said that he had discussed this with Mr. Klein on several occasions and that there were none.

Q. Now in reference to your discussion with Mr. Cohen about seniority, were you a district manager prior to Kurt Noack's becoming a district manager?

A. Yes, I was.

Q. Were you a district manager prior to Kurt Noack even being hired by Plitt?

A. Yes, I was.

MR. KARASIK: Objection, your Honor.

THE COURT: Overruled.

BY MR. MATHLESS:

Q. Were you a district manager prior to Pat Burns becoming a district manager?

A. Yes, I was.

THE COURT: I think this might be a good time to stop for lunch. It's 12:30, and I have a brief matter to take up. It shouldn't take more than 15 or 20 minutes, but I'm not sure of that.

I'm going to ask the jury to come back at 2:15. We will resume immediately after that time as soon as we can. Please remember my previous admonitions.

MR. MATHLESS: Your Honor, do you wish to collect the exhibits at this time?

THE COURT: Yes, I think so.

(At 12:30 o'clock p.m., the within trial was recessed until 2:15 o'clock p.m. of the same day, Tuesday, March 27, 1984.)

of 1981. What was the big movie that failed Christmas of 1981?

A. I believe it was "Reds."

Q. When did the business decline slow down or stop?

A. I ould have to say not until the end of June of 1982, and then there was somewhat of an upswing as a result of just one picture, and that was "E.T." The rest of the summer was not that good with all the other pictures. That one picture helped pull the summer up, but it was not up to expectations.

Q. So, even in June 1982 things were still sluggish, right?

A. Definitely.

Q. Earlier, I believe it was yesterday, we made reference to a district manager in training, Mr. Sadighian, do you recall that?

A. Yes.

Q. He's about 40, 41 years old?

A. Correct.

Q. When was the suggestion first approached of creating the district manager in training position –

MR. KARASIK: Your Honor, that's outside the scope of direct.

THE COURT: Read the question back.

Q. Do you recall the following questions and answers appearing on page 42?

"Question: When was the position of district manager in training created? Answer: I think around August or September of last year."

Mr. Cohen, your deposition was given in 1983, so you're referring to 1982?

A. Correct.

Q. "Question: Did you have any input in creating that position? Answer: No, I think that was a decision that stemmed also from Harold Klein and the projected possible expansion of our circuit."

Do you recall those questions being asked of you and do you recall giving those answers?

MR. KARASIK: Your Honor, I don't think there's anything impeaching about that.

THE COURT: Let him answer. It's cross examination.

THE WITNESS: I think I answered there was possible expansion, some of which occurred, some of which has not occurred. I think I answered the question, sir.

BY MR. MATHLESS:

Q. So, two months after this very bad time starting to level off because of E.T., things are perking up and you're

BY MR. KARASIK:

Q. Have you completed your answer now?

A. Yes.

Q. Mr. Cohen, reference was made to a job title, district manager in training. Is it fair to say that the creation of that job was planning for the future?

A. Yes, it was.

Q. Is Mr. Sadighian the district manager in training at the present time?

A. Yes, he is.

Q. He's still in training?

A. Still in training.

Q. One last question. You mentioned a movie called E.T.?

A. Yes.

Q. Is it correct to say that that was one of the best box office perfoming films in recent history?

A. Yes, it is correct.

MR. KARASIK: I have no further questions, your Honor.

RECROSS EXAMINATION

BY MR. MATHLESS:

Q. How long has it taken you to train Mr. Sadighian?

A. How long is it taking us to train him – an

indefinite period of time. I don't think the man is ready at this point of assuming a district, nor do we have the need for a district manager. Our districts are properly covered with the present personnel, and I cannot justify an addition to my staff at this point in time.

Q. Did you just tell us that Sadighian isn't ready at this time?

A. I said I don't think he's ready for a full-fledged district managership if there were one available, and there's not one available.

Q. So if he's been training for a year and a half and if there were one available, he's not yet ready?

MR. KARASIK: Your Honor, the subject isn't Mr. Sadighian's qualification, that's really far afield, it seems to me.

THE COURT: Let him answer.

THE WITNESS: I would have to say he still needs some additional training. He has spent very little time in training because his primary duties are managing director of Watertower Theaters and when a man is doing something part-time it takes a lot longer to train an individual than if he were at it on a full-time basis.

MR. KARASIK: 12, I don't think there is an iota of evidence on willfulness, Judge, as defined in – in some circuits, they define it as an intentional deliberate discharge, and in others, they say it has to be a reckless kind of thing. But I don't think there's any evidence – in fact, the evidence is to the contrary in letting Mr. Coston go. They felt considerable compassion for him. They gave him severance pay. I don't think there's anything here that would support that finding of willfulness.

MR. MATHLESS: Is Mr. Karasik arguing the case, or instruction?

MR. KARASIK: I'm arguing the applicability of the instruction on the basis of the evidence. That's what we're here for.

MR. MATHLESS: The statement, "We're going with youth," is evidence of willfulness. And the Seventh Circuits have one of the strictest standards among the Circuits.

THE COURT: Why do you offer this at this point in the instructions? That's what I'm asking.

MR. MATHLESS: You mean as opposed to –

THE COURT: Putting it in at the burden of proof instruction. I'm putting it at this stage, it's going to be very confusing to the jury. I think it

will be.

MR. MATHLESS: Well, I put it in at this stage because the issues of liability and damages will already have been taken care of, and then the remaining issue is willfulness. I see no other issues left at that point for the jury to decide, because I suppose you could say whether to double the damages or not should be decided, but I think once they determine the damages, then the Court can do the computation as to doubling as easy as the jury. It's probably more the province of the Court, in light of the fact that the Court will be deciding on how to rule the missing factor.

THE COURT: I see what you're doing. You then added an interrogatory to answer that question. Okay. I think that's a question for argument. And then the other, the interrogatory will take care of that question.

MR. KARASIK: So—

MR. MATHLESS: So, 12 will —

THE COURT: I'm going to give 12 and Plaintiff's Interrogatory No. 1.

MR. KARASIK: Well –

THE COURT: Do you have any objection to Interrogatory No. 1?

go through the other ones quickly and I will show you the ones that I added.

The first three, those are Plaintiff's Instructions 1, 2 and 3.

The next one is Plaintiff's Instruction 6.

The next one is the Court's instruction.

The next one is Plaintiff's Instruction 4,

that is, "In deciding whether any fact has been proved."

The next one is the circumstantial evidence instruction, which I think should be given in almost every case and certain in this case, and that is the Court's instruction.

And the reading of depositions, there was no instruction offered on the reading of depositions. There was a deposition read in this case. I assume you didn't know you were going to read it and that is why you didn't prepare it.

MR. MATHLESS: Found out a day and a half before trial.

THE COURT: And then the "observation, experience in the affairs of life," which is a standard IPI instruction.

The next one is the defendant's instruction, which I modified by striking out all of the language below, and it's just a brief statement of what the case is about.

The next one is a plaintiff's instruction

which relates to the agency which no one has any objection to.

The next two are the ones we just talked about.

The next one is, "If you decide on the defendant on the question of liability, you have no occasion to consider the question of damages." It is right out of IPI.

The next one is modified plaintiff's instruction. That was because of the change, wasn't it?

MR. KARASIK: I didn't have "assess the damages" in there, and that is why you had to put that in.

THE CLERK: The damages on the wages –

THE COURT: There were a lot of other things in there, and we had to modify it to change that.

The next one is the instruction to the jury.

The next two are the verdict forms, then the willfulness instruction, Plaintiff's Instruction No. 12.

Then there is the two special interrogatories. And finally, there is just one that I usually give, so that the jury will know if they want to communicate with the Court.

Okay?

MR. MATHLESS: Yes, your Honor, we would like to complete our record.

THE COURT: All right. Will you please?

grievance about his being fired because of age was months after the fact.

Now, ladies and gentlemen, I would like to briefly review what the plaintiff's evidence was. In all of the testimony that you have heard during these two days of trial, there are really only two points that Mr. Coston can show you on his case as a basis for his claim of age discrimination.

He tells you that Mr. Cohen said to him in that conversation of January 4, 1982, "We will go along with youth." I think those were the exact words that Mr. Coston quoted on the stand yesterday, not "We go with youth; we will go along with youth."

And the second point that Mr. Coston relies upon is that his duties were taken over by some district managers who were younger than he was.

Now let's examine each of those propositions, and I want to show you that each one of them is as thin as a piece of paper. First of all, Mr. Cohen flatly denies that he said any such thing. What you have then is the word of one man against another word of another man. And as the Court is going to instruct you in deciding this case, you are going to have to decide it by what is called a preponderance of the evidence. It has to weigh down on the scales in favor of one or the other.

open court. In considering the evidence in this case, you are not required to set aside your own observation and experience in the affairs of life, but you have a right to consider all of the evidence in the light of your own observation and experience in the affairs of life.

Plaintiff hired in 1978 was employed as a district manager and operations manager for Plitt Theatres. In January 1982 he was discharged from those positions.

Plaintiff claims that his age, 59, was a determinative factor in his discharge.

Defendant denies that the plaintiff's age was a determinative factor in his termination.

Harold Klein and Irwin Cohen were agents of the defendant, Plitt Theatres, Inc., at the time of Sam T. Coston's termination from his employment with Plitt. Therefore, any act of Harold Klein and/or Irwin Cohen at that time was in law the act of the defendant, Plitt Theatres, Inc.

The plaintiff has the burden of proving each of the following propositions:

First, that he was within the age group protected by the age discrimination and employment act, persons between the ages of 40 and 70, at the time he was discharged.

Second, that he was performing his job at a level that met the defendant's legitimate expectations.

Third, that he was nevertheless discharged.

APPENDIX C

ISSUES PRESENTED FOR REVIEW

1. Whether, in an age discrimination in employment case the jury was properly instructed as to the proper standard of a "wilful violation" recently pronounced by the United States Supreme Court and this Circuit?

2. Whether the district court committed prejudicial error in its method of calculating plaintiff's "liquidated damages" pursuant to the pertinent provision of the ADEA?

3. Whether the jury's verdict that age was "*a determining factor*" in plaintiff's discharge was clearly erroneous, contrary to the manifest weight of the total evidence, or, unsupported by substantial evidence?

4. Whether, in the circumstances of the instant case, the award of attorney's fees to plaintiff's counsel was proper?

JURISDICTIONAL SUMMARY

Jurisdiction over the subject matter of the action is claimed to arise under 28 USC, §1331 because the case arises under a law of the United States.

This Court has jurisdiction to review the district court's final order by virtue of 28 USC, §1291.

STATEMENT OF THE CASE

This was an action under the Age Discrimination in Employment Act (hereafter "ADEA"), 29 USC, §621-634 (1976).

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY INSTRUCTED THE JURY AS TO THE PROPER STANDARD FOR A "WILFUL VIOLATION" OF THE ADEA AND REFUSED TO SET ASIDE THE JURY'S VERDICT AFTER BEING ADVISED OF THE SUPREME COURT'S MOST RECENT PRONOUNCEMENT ON THE ISSUE.

Over objection of defendant, at the conference on jury instructions (Tr. 293), Judge Roszkowsky instructed the jury on the issue of wilfulness as follows:

> If you decide for the Plaintiff on the question of liability, you must then decide whether the discrimination by the Defendant was wilful. In order for the discrimination by the Defendant to have been wilful, the Defendant's actions must have been knowing and voluntary and the Defendant either knew or reasonably should have known that its actions were in violation of the law.
>
> Defendant has admitted that it was at all times award of the illegality of age discrimination. Whether these elements of wilfulness have been proved by the evidence is for you to determine. (Tr. 401).

The foregoing instruction was taken from *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F. 2d 149, 156 (7th Cir. 1981).*

Subsequent to the jury's verdict, defendant moved the district court for leave to file as an additional authority in

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* *Syvock* relied on *Wehr* v. *Burroughs Corp.*, 619 F. 2d 276, 280 (3d Cir. 1980). *Wehr* was not followed by a subsequent Third Circuit District case, *Berndt* v. *Kaiser Alum. & Chem. Sales Inc.*, 694 F. Supp. 962, 966 (ED Pa. 1985) which observed the more "stringent standard of wilfulness" adopted by the U.S. Supreme Court in *TWA* v. *Thurston*, ___ U.S. ___, 105 S. Ct. 613 (1985) discussed infra.

support of its post-trial motion: the decision of the Supreme Court entered on January 8, 1985 in *Trans World Airlines Inc.* v. *Thurston*, ___ U.S. ___, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). One of the major issues before the high court in *Thurston* was the standard of defining a "wilful violation" of the ADEA. After reciting the legislative history of the Act and its affinity to the Fair Labor Standards Act which also provides for a "wilful violation", the court in *Thurston* said:

> The manner in which FLSA §16(a) has been interpreted therefore is relevant. In general courts have found that an employer is subject to criminal penalties under the FLSA when he 'wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law.' [citation]. This standard is substantially in accord with the interpretation of 'wilful' adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated that a violation of the Act was 'wilful' if 'the employer . . . knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' (713 F. 2d at 956). Given the legislative history of the liquidated damages provisions, *we think the 'reckless disregard' standard is reasonable.* (105 S. Ct. at p. 624). (Emphasis added).

The Supreme Court said that the foregoing definition "is an acceptable way to articulate a definition of 'wilful' " even though the Second Circuit, from which the *Thurston* case was appealed, "misapplied this standard". (*id*)

In language pertinent to the erroneous instruction given by the district judge in the case at bar, the Supreme Court in *Thurston* said at p. 625:

> We are unpersuaded by respondent's [the employee's] argument that a violation of the Act is 'wilful' if the employer simply knew of the potential applicability of the ADEA. Even if the 'in the picture'

> standard were appropriate for the statute of limiations, the same standard should govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondent would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme.

Although the language of the instruction in the case at bar is not simply based upon the "simply knew" test, nevertheless the heart of the instruction is that the defendant "*either knew or reasonably should have known that its actions were in violation of the law.*" That Plitt in the case at bar did in fact know *of* the ADEA, or should have known that its action was in violation of the law, falls far short of the "reckless disregard" standard postulated by the Supreme Court in *Thurston*. The definition given by the district judge was no more than that of mere negligence.

Not only did the instant instruction reflect an incorrect test of wilfulness, it is significant that during its deliberation, the jury sent a written interrogatory to the trial judge:

> Your Honor,
>
> > If age discrimination is found, and the stipulations state that the defendants are aware of the age discrimination statutes, what conditions would justify a finding of "not willful" discrimination?* (Envelope attchd. rec.)

The question reveals the jury's mistaken belief that

---

*Judge Roszkowski informed counsel for the parties that the jury sent the interrogatory but did not reveal its contents. He did not respond to the interrogatory. The interrogatory was apparently withdrawn. (Envelope)

because Plitt was aware of the existence of the law prohibiting age discrimination, and that it fired Sam Coston, ergo, Plitt was guilty of a "wilful" violation of the Act. The jury's interrogatory signifies that in effect the jury considered defendant's mere knowledge of ADEA's existence as "in the picture", and equivalent to "wilfulness" in its discharge of plaintiff.

As recently as March 1986 this Court applied the ruling in *Trans World Airlines* v. *Thurston*, supra, in the context of a FLSA case. (*Walton* v. *United Consumers Club, Inc.*, 786 F. 2d 303 (7th Cir. 1986)). The court in *Walton* reversed and remanded to the district court for determination as to whether the employer had wilfully violated the Act. Citing *Trans World Airlines* v. *Thurston*, supra, this Court in *Walton* noted (at p. 308):

> Almost all of the cases construing these statutes [FLSA and ADEA] predate Trans World Airlines, Inc. v. Thurston [citation]. *Thurston* dealt with the interaction of the Fair Labor Standards Act with the Age Discrimination In Employment Act.... Under the ADEA damages are doubled 'only in cases of wilful violations'....The Court held in *Thurston* that 'wilful' means 'reckless disregard' for the law 'and an indifference to its requirements'. [citation]... Wilfulness is a weasel word; see American Nurses Assn. v. Illinois, 783 F. 2d 716, 726 (7th Cir. 1986), denoting a range of culpability from gross negligence to actual knowledge plus malice, depending on the context. *Usually it denotes some highly culpable mental state either actual knowledge that one's acts violate the law, or reckless indifference to the law.* (Emphasis added).

The court in *Walton*, in language pertinent to the case at bar said (p. 311):

> We therefore agree with the courts that have held that 'wilful' means the same thing throughout the ADEA and FLSA. [citation] *Thurston* supplies one definition of 'wilful' for both.

The challenged instruction in the case at bar was based upon the holding in *Syvock* v. *Milwaukee Boiler Mfg. Co., Inc.*, 665 F. 2d 149, 156 (7th Cir. 1981). The court's ruling in *Walton*, supra is an implicit overruling of the test in *Syvock* and therefore, the instruction given by Judge Roszkowski was erroneous. This case presents an opportunity for the Court explicitly to overrule *Syvock* in the context of a wilful violation of the ADEA.

II.

THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN ITS METHOD OF CALCULATING PLAINTIFF'S "LIQUIDATED" DAMAGES PURSUANT TO THE ADEA (29 USC §626 (b)).

§626(b) of the ADEA in pertinent part provides:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this Title [Fair Labor Standards Act]: *provided*, that liquidated damages shall be payable only in cases of wilful violations of this chapter.